

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

JAMES ROLLAND SWANSON,

Plaintiff,

vs.

JEB MORROW, an individual; KENNETH
BUSHNELL, an individual; OZZIE
GREGORIO, an individual; and the
F/V HEIDI, a fishing vessel, home
ported in Petersburg, Alaska,
official number 227373;

Defendants.

No. 03:14-cv-00025-HU

**FINDINGS & RECOMMENDATIONS
ON MOTION TO DISMISS**

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Defendant appearing *pro se*

1 HUBEL, Magistrate Judge:

2 The plaintiff James Rolland Swanson brings this action under
3 the Jones Act, 46 U.S.C. § 30104, seeking damages for personal
4 injuries he allegedly sustained while working as a seaman on the
5 fishing vessel "Heidi," which Swanson alleges was owned by the
6 defendants Jeb Morrow, Kenneth Bushnell, and Ozzie Gregorio.*
7 Currently before the court is the defendant Gregorio's *pro se*
8 "Motion for Dismissal Claim not Legit Fraud." Dkt. #8.

9 In his motion, Gregorio claims that prior to the time of
10 Swanson's injury, Gregorio had sold his interest in the Heidi to
11 the defendant Bushnell. Gregorio claims that Bushnell "accept[ed]
12 all responsibility" for Swanson's injury "due to operator error."
13 *Id.*, p. 2. Gregorio attaches to his motion a copy of a Bill of
14 Sale, and a Bill of Sale Addendum, which, on their face, evidence
15 an installment contract for Bushnell's purchase of the Heidi from
16 Gregorio. See *id.*, pp. 4 & 5.

17 In response, Swanson asserts Bushnell's purchase of the vessel
18 was not complete, as evidenced by the installment contract itself.
19 Swanson further argues the sale was never recorded in the records
20 of the United States Coast Guard. Swanson attaches copies of
21 various documents purporting to evidence Gregorio's legal ownership
22 of the Heidi, as well as an "Agreement" dated April 3, 2012,
23

24 *In the caption of Swanson's Complaint, he spelled this
25 defendant's name as "Gregario." See Dkt. #1, p. 1. However, in
26 the body of the Complaint, he spelled the name "Gregorio." See
27 *id.*, ¶ 5 *et seq.* The defendant himself spells his name "Gregorio."
28 See, e.g., Dkt. #8. The court directs the Clerk of Court to
correct the spelling of the defendant's name on the docket to
"Gregorio," and directs the parties to use the spelling "Gregorio"
in all further filings in the case.

2 - FINDINGS & RECOMMENDATION

1 purporting to evidence Bushnell's return of possession of the Heidi
2 to Gregorio. See Dkt. #15, pp. 3-16.

3 The court construes Gregorio's motion to dismiss as one for
4 failure to state a claim, under Federal Rule of Civil Procedure
5 12(b)(6). "As a general matter, a district court may not consider
6 any material outside of the pleadings when ruling on a Rule
7 12(b)(6) motion." *O'Connell-Babcock v. Multnomah County, Oregon*,
8 No. 08-cv-459-AC, slip op., 2009 WL 1139441 at *4 (D. Or. Apr. 24,
9 2009) (King, J.) (citing *Lee v. City of Los Angeles*, 250 F.3d 668,
10 688 (9th Cir. 2001)). Although an exception exists for certain
11 documents whose contents are alleged in a pleading and whose
12 authenticity is unquestioned, but which are not attached to the
13 pleading, that is not the case here. The contents of the documents
14 presented by the parties in connection with Gregorio's motion are
15 not alleged in the Complaint, nor is it clear that their authen-
16 ticity is unquestioned.

17 The court, therefore, must either consider Gregorio's motion
18 and Swanson's response without reference to any of their exhibits,
19 or must treat the motion as one for summary judgment under Federal
20 Rule of Civil Procedure 56. See Fed. R. Civ. P. 12(d). Here,
21 however, that distinction is one without a difference, because in
22 either case, the motion fails.

23 If no reference is made to the parties' exhibits, then the
24 scope of review is limited to the Complaint, which simply must
25 state a plausible claim for relief. See *Gambie v. Cornelius*, No.
26 10-CV-6265-AA, 2011 WL 1311782 (D. Or. Apr. 1, 2011) (Aiken, C.J.)
27 (discussing the standards for motions to dismiss). Swanson's
28 Complaint meets this standard. Although Gregorio is entitled to

1 deny Swanson's claims in an Answer, and to defend against them in
 2 the action, his unsupported assertion that he did not own the Heidi
 3 at the time of Swanson's alleged injuries is not enough to prevail
 4 on a motion to dismiss.

5 If the court does consider the parties' exhibits, then it
 6 becomes clear that a genuine dispute exists regarding ownership of
 7 the vessel at the time of the alleged accident, precluding summary
 8 judgment. See Fed. R. Civ. P. 56(a).

9 Thus, whether considered as a motion to dismiss, or as a
 10 motion for summary judgment, Gregorio's motion must be denied, and
 11 the undersigned so recommends.

12 **SCHEDULING ORDER**

13
 14 These Findings and Recommendations will be referred to a
 15 district judge. Objections, if any, are due by **July 14, 2014**. If
 16 no objections are filed, then the Findings and Recommendations will
 17 go under advisement on that date. If objections are filed, then
 18 any response is due by **July 31, 2014**. By the earlier of the
 19 response due date or the date a response is filed, the Findings and
 20 Recommendations will go under advisement.

21 IT IS SO ORDERED.

22 Dated this 25th day of June, 2014.

23
 24 /s/ Dennis J. Hubel

25 Dennis James Hubel
 26 Unites States Magistrate Judge
 27
 28